

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.**

S. B. CIVIL MISC. APPEAL NO. 1410/1999.

**ZAL J. KAWASJI
V
RAJASTHAN STATE ELECTRICITY BOARD**

**S.B. CROSS OBJECTION NO. 2/99
IN
S.B. CIVIL MISC. APPEAL NO. 1410/99**

Date of Judgment:

10th October, 2006

Hon'ble Mr. Justice R. S. Chauhan

Mr. Manu Bhargava, for the appellant.
Mr. G.C. Garg and
Mr. Virendra Lodha for the respondents.

By Court:

The appellant-defendant is challenging the order dated 23.10.99 passed by the Addl. District Judge No.2, Jaipur City, Jaipur whereby the learned Judge had dismissed the application under Order 9 Rule 13 of the Code of Civil Procedure (henceforth to be referred to as 'the Code', for short).

The brief facts of the case are that the respondent-plaintiff had filed a civil suit for recovery of Rs. 5,15,885.65 paisa ostensibly on the ground that in 1975 M/s. Mount Abu Electric Supply Company, of which the appellant was one of the partners, was taken over by the respondent-plaintiff Company. According to

the plaintiff, the Company had paid more compensation than was necessary to M/s. Mount Abu Electric Supply Company. Hence, it was entitled to recover the aforesaid amount from the aforesaid firm. The appellant was one of the partners firm. Therefore, he was also liable for the payment of the said amount. Repeatedly notices were issued by the trial court, but the same were never received by the appellant. Therefore, subsequently a notice was published in Times of India, a English daily. However, according to the appellant Time of India is not in circulation in a small town like Mahu (M.P.). Therefore, despite the said publication and despite the said substituted service, the appellant had no knowledge about the pendency of the civil suit against the partnership firm. However, despite the said publication the appellant did not appear before the trial court. Therefore, the trial court vide order dated 4.5.92 proceeded ex-parte and eventually an ex-parte judgment was passed on 29.7.93. But, as soon as he came to know about the ex-parte judgment and decree in December, 1996, in January, 1997 he moved an application under Order 9 Rule 13 CPC before the learned trial court. After hearing both the learned counsel for the parties, the learned trial court has dismissed the said application. Hence this appeal before this Court.

Mr. Manu Bhargava, the learned counsel for the appellant, has vehemently argued that no evidence has been

produced before the trial court to prove that notice were duly served upon the appellant. An English newspaper like the Times of India, way back in the year 1993 was not in circulation in a small town like Mahu. Therefore, the publication of the notice in the said newspaper is not a sufficient notice to the appellant.

On the other hand, Mr. G.C. Garg and Mr. Virendra Lodha, learned counsel for the respondents, have strenuously argued that a substitute service is sufficient.

We have heard the learned counsels for the parties and have perused the impugned order.

The Hon'ble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy (AIR 1998 S.C. 3222) has held that “ in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor.” Thus, the court must lean towards granting an opportunity to the defendant to put forth his defence. The opportunity of hearing is not only part of the principles of natural justice, but also has been granted by the Statute and also by the Constitution itself. Therefore, the said

opportunity should not be denied lightly by the trial court. However, as the interest of the respondent-plaintiff equally deserves to be protected, it would be in the interest of justice to direct the appellant to furnish a solvent security of 50% of the recovery amount.

Therefore, in the interest of justice, we quash and set aside the orders dated 24.7.93 and 23.10.98 alongwith the ex-parte proceeding order dated 25.8.92 and allow the application under Order 9 Rule 13 CPC. We further direct the appellant to appear before the trial court on 30.11.06. We also direct the appellant to deposit a solvent security of 50% of the recovery amount i.e. of Rs. 2,57,942.50/- in favour of the respondents. We further direct the trial court to record the evidence on day-to-day basis and to conclude the trial within a period of six months from the first day of appearance of the appellant i.e. from November 30, 2006. The appellant and the other respondents are directed to cooperate with the trial court for an early decision of the case within the stipulated period of six months. With these directions this appeal is allowed.

Since this Court is quashing the ex-partment judgment and decree and setting aside the impugned order dated 23.10.98 and is directing the trial court to re-commence the trial, therefore, there is no merit in the cross objection filed the respondents. They are, hereby, dismissed.

MRG.

(R.S. CHAUHAN) J.